

EXHIBIT A

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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19 All Nippon Airways Company, Ltd.,

Case No. 07-03422 EDL

20 Plaintiff,

21 vs

22 United Air Lines, Inc.,

23 Defendant.

**DECLARATION OF SCOTT TORPEY IN
SUPPORT OF DEFENDANT UNITED AIR
LINES, INC.'S MOTION TO COMPEL
DISCOVERY AND FOR ADDITIONAL
TIME TO DEPOSE WITNESSES**

DATE: January 29, 2008

TIME: 9:00 a.m.

CTRM: San Francisco

JUDGE: Elizabeth D. Laporte

DECLARATION OF SCOTT TORPEY

24 STATE OF MICHIGAN)

)

25 SS.

26 COUNTY OF OAKLAND)

)

27 I, Scott Torpey, being duly sworn according to law, hereby depose and states:

1 I am a partner at the law firm of Jaffe Raitt Heuer & Weiss, P C , in Southfield
2 Michigan. I am duly licensed and qualified to practice law in California. I represent defendant
3 United Air Lines, Inc., ("United") in the above-captioned matter, which All Nippon Airways
4 Company, Ltd , ("ANA") filed against United on June 28, 2007 I make this Declaration in
5 support of United's Motion to Compel to Compel Discovery and For Additional Time to Depose
6 Witnesses and to certify, pursuant to Fed. R. Civ. P. 37(a)(1), that on December 21, 2007, I
7 called ANA's counsel in an effort to secure the disclosure without court action. Additionally, I
8 previously informed ANA's counsel at the recent depositions of ANA's flight crew that I would
9 be filing a motion to compel.

10 2 On July 24, 2007, United served ANA with a Notice of Taking Video Depositions
11 of Teruo Usui, Eishin Yamaguchi, and Yusuke Nishiguchi ("Notice"), who comprised the flight
12 crew that was operating ANA's aircraft when the collision at issue in this litigation occurred. A
13 true and correct copy of the Notice is attached hereto as **Exhibit 1**.

14 3 United noticed the depositions to be held in San Francisco. ANA subsequently
15 requested that the depositions be held in its attorney's Los Angeles office rather than San
16 Francisco. United agreed to accommodate this request.

17 4 On September 12, 2007, United served ANA with an Amended Notice of Taking
18 Video Depositions ("Amended Notice"), re-noticing the depositions for November 27-29, 2007
19 in Los Angeles. A true and correct copy of the Amended Notice is attached hereto as **Exhibit 2**.
20 In the Notice and Amended Notice, United requested that ANA bring certain documents to the
21 depositions. United asked for documents reflecting accidents, incidents and disciplinary actions
22 involving ANA's flight crew, training and certification records for the flight crew, and
23 documents regarding the SGHA.

24 5 On November 16, 2007, United served its Third Amended Notice of Taking
25 Video Depositions ("Third Notice"), adding to its previous document requests a request for
26 copies of the current ANA Flight Operations Manual, the Manual that was in effect on the date
27

1 of the incident, any documents that ANA or the flight crew were required to have on board the
2 aircraft, and routing documents for the flight. A true and correct copy of the Third Notice is
3 attached hereto as **Exhibit 3**.

4 6. On October 12, 2007, United served ANA with its First Request to Produce, a
5 true copy of which is attached hereto as **Exhibit 4**. As it did in the deposition notices, United
6 asked for information regarding the pilots, including disciplinary records from 1995 to date,
7 training and certification records from 1995 to date, and records related to any accident or
8 incidents they were involved in from 1995 to date. United also asked for an unedited copy of the
9 cockpit voice recording (CVR) taken at the time of the accident, ANA's conflict clearing
10 policies, and documents regarding the SGHA and the annexes thereto

11 7. United received ANA's response to the First Request Produce on November 19,
12 2007. A true and correct copy of ANA's response is attached hereto as **Exhibit 5**. ANA
13 objected to every single request and produced minimal documents. Regarding United's requests
14 for information about the flight crew, ANA raised boiler-plate objections and an objection based
15 upon "Japan's Act on the Protection of Personal Information." Nonetheless, ANA stated that the
16 information would be produced at the depositions if the pilots agreed to waive the protections of
17 the Act. Further, United agreed to make the CVR available for inspection and copying. ANA
18 did not object to production of the CVR on the ground that federal law barred its discovery.
19 With regard to the conflict resolution policies, ANA stated that it was "currently searching its
20 records to locate documents responsive to this request and will produce any non-privileged
21 documents responsive to this request that may be located." *Id.* Also, ANA produced only 10
22 pages of documents regarding the SGHA.

23 8. On November 19, 2007, ANA's attorney e-mailed me stating that he now
24 intended to produce the pilots for deposition in San Francisco rather than Los Angeles, even
25 though United moved the depositions to Los Angeles at the request of ANA's counsel. Attached
26 hereto as **Exhibit 6** is a true and correct copy of United's Fourth Amended Notice of Taking
27

1 Video Depositions, re-noticing the depositions for San Francisco. This unilateral change was
2 purportedly made to accommodate the pilots' work schedules, as counsel indicated they would
3 be flying in and out of San Francisco on working flights. This assertion proved at the
4 depositions to be false, as all three pilots testified that they flew into San Francisco as
5 passengers, were flying out as passengers, and would not be working again for several days. As
6 a result of the change in the location, United incurred thousands of dollars in additional
7 expenses. I had to cancel a guaranteed ticket to Los Angeles and buy a new, more expensive
8 ticket on short notice just prior to the Thanksgiving holiday to San Francisco at a cost of
9 \$1,400.00. Also, United incurred hotel and meal expenses for its Los Angeles-based interpreter
10 and co-counsel for four days. That would not have been necessary had the deposition remained
11 in Los Angeles. It is estimated that these additional expenses exceeded \$2,500.00. Additionally,
12 fees for the travel time to and from San Francisco for the interpreter and co-counsel are estimated
13 to be in excess of \$1,000.00.

14 9. The deposition of ANA's pilot in command, Mr. Yamaguchi, commenced on
15 November 27, 2007. A true and correct copy of the mini-transcript, video, and deposition
16 exhibits from Eishin Yamaguchi's deposition is attached hereto as **Exhibit 7**. At the deposition,
17 ANA produced a few, redacted pages (in Japanese) regarding the pilots' training and certification
18 and an incomplete version of its current Operations Manual. ANA produced nothing else of
19 substance. Further, to make the most use of the time, I proposed that the deposition be taken
20 primarily in English and that the interpreters be used only where necessary. This proposal was
21 reasonable considering that Mr. Yamaguchi, Mr. Nishiguchi and Mr. Usui all understand and
22 speak English fluently, as required to be a commercial airline pilot. ANA's counsel declined the
23 offer without even attempting to proceed in English. This full translation drastically reduced the
24 time available to conduct the deposition, and the delay was compounded by the fact that both
25 United and ANA had interpreters present.

1 10. ANA's counsel did not even allow United the full seven hours available under
2 Fed. R. Civ. P. 30(d)(1) for the deposition of Mr. Yamaguchi. As the court reporter's certificate
3 shows, counsel unilaterally terminated the deposition after only 6 hours and 36 minutes on the
4 record, which, in actual deposition time, was closer to three to four hours due to the extensive
5 delay caused by the English/Japanese translation, the objections posed by ANA's attorney and
6 argumentation over various issues. A true and correct copy of the court's reporter's certificate
7 showing the actual deposition time is attached hereto as **Exhibit 8**.

8 11. All three pilots gave extremely evasive and non-responsive testimony at their
9 depositions, aided by counsel's suggestive objections. An example of this occurred during Mr.
10 Nishiguchi's deposition. A true and correct copy of the mini-transcript, video, and deposition
11 exhibits from the deposition of Yusuke Nishiguchi is attached hereto as **Exhibit 9**. During the
12 deposition, I asked Mr. Nishiguchi several clear and direct questions as to what he would do if
13 there was a potential conflict between his plane and another plane and he was unsure whether a
14 collision would occur. Mr. Nishiguchi spent 45 minutes dodging the questions. Taking a cue
15 from the "form, foundation and incomplete hypothetical" objections repeatedly raised by ANA's
16 attorney, Mr. Nishiguchi ultimately refused to give any substantive answer, stating that he could
17 not answer "hypothetical questions the conditions of which are incomplete." During this
18 exchange with Mr. Nishiguchi, ANA's counsel objected 17 times.

19 12. I went through a very similar exchange with Mr. Usui, who refused to answer
20 questions about what he would do if there was a potential conflict between his airplane and
21 another plane. A true and correct copy of the mini-transcript, video, and deposition exhibits
22 from the deposition of Teruo Usui is attached hereto as **Exhibit 10**. This evasion lasted for over
23 one hour. ANA's counsel raised 29 form, foundation and incomplete hypothetical objections
24 during this span of the deposition.

25 13. On or about December 13, 2007, ANA served United with additional documents
26 in response to United's First Request to Produce. A true and correct copy of the letter
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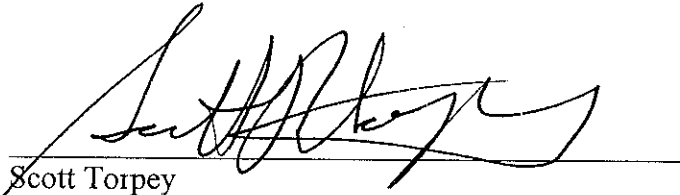
1 accompanying the documents is attached hereto as **Exhibit 11**. ANA produced no additional
 2 documents related to the SGHA and no additional documents regarding the pilots' training,
 3 disciplinary actions and certifications. Also, ANA asserted, for the first time, that discovery of
 4 the CVR was barred as a matter of federal law.

5 14. A true and correct copy of a printout of the National Transportation Safety
 6 Board's Docket Contents for the investigation of the collision at issue in this litigation is attached
 7 hereto as **Exhibit 12**


8 15 14 C.F.R. § 91.609(e)(2) requires that the CVR be powered up from the
 9 commencement of the pre-flight checklist by the pilots until the completion of the final checklist
 10 at the end of the flight. On information and belief, the CVR in the ANA airplane consisted of six
 11 audio files, including a recording taken by the cockpit's area microphone and another that is a
 12 combined interphone/p a. recording.

13 16. The partial CVR transcript that exists in this case was prepared by ANA and
 14 submitted to the NTSB, which did not prepare its own transcript. A true and correct copy of the
 15 partial transcript is attached hereto as **Exhibit 13**.

16 **FURTHER AFFIANT SAYETH NOT.**

17
 18 
 19 Scott Torpey

20 Subscribed and sworn to before me
 21 this 21st day of December, 2007

22 
 23 Notary Public, Wayne County, MI
 24 My Commission Expires: _____

SHEILA A. RENCHER
 Notary Public, Wayne County, MI
 My Commission Expires April 20, 2008

25 Acting in Oakland County, MI
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